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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Haywood S. Gilliam, Jr., Judge

PHILLIP RACIES, ON BEHALF OF )  
HIMSELF AND ALL OTHERS )  
SIMILARLY SITUATED, )  
 )  
 Plaintiff, )  
 )  
 VS. ) NO. CV 15-00292-HSG  
 )  
 QUINCY BIOSCIENCE, LLC, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Oakland, California  
Friday, February 14, 2020

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

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For Defendant:

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Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR  
Official Reporter

1        **Friday - February 14, 2020**

10:00 a.m.

2        **P R O C E E D I N G S**3        **---000---**4            **THE CLERK:** We're calling CV 15-292, Racies vs. Quincy  
5 Bioscience, LLC.6            Please step forward and state your appearances for the  
7 record, please.8            **MR. WELTMAN:** Good morning, Your Honor. Stewart  
9 Weltman on behalf of the plaintiff.10          **THE COURT:** Good morning, Mr. Weltman.11          **MR. COLE:** Good morning, Your Honor. William Cole,  
12 Matthew Orr, and Geoffrey Castello for the defendant.13          **THE COURT:** Good morning, Mr. Cole.14          There are three motions that are teed up for hearing. One  
15 is the defendant's motion to decertify the class. The  
16 defendants also made a motion for judgment as a matter of law,  
17 and the plaintiffs have made a motion for judgment as a matter  
18 of law.19          Here is how we'll proceed. I don't need to hear any  
20 argument on the plaintiff's motion for judgment as a matter of  
21 law because I'm going to deny it. Based on the record at  
22 trial, there was certainly evidence upon which the jury could  
23 have gone either way on the question of the efficacy of the  
24 product, which was the basis for the motion, so we don't need  
25 to talk about that.

1       I really want to talk about the motion to decertify  
2 because in reviewing the record, I had some real concerns about  
3 the manner in which the evidence came in. It was odd to me --  
4 and I went back and looked at the record from the class  
5 certification motion -- that there were particular labels that  
6 were presented. The case that was made to me at the class  
7 certification stage seemed to be materially different than the  
8 case that was put on at trial. And essentially when it came  
9 down to it -- and I think Mr. Racies was awfully careful on the  
10 stand, and he admitted that he just couldn't remember which  
11 product he bought.

12       It also seemed very strange to me that he assiduously kept  
13 the receipt years later but somehow couldn't find the actual  
14 bottle, and that he was never even shown a label, and that the  
15 only label that was actually put in evidence was put in by the  
16 defense, and that was the brain cell protection label, and it  
17 looked like it's actually a bottle label rather than a package,  
18 Exhibit 536.

19       Exhibit 355 was what the plaintiff purported to offer as  
20 evidence with the product that Mr. Racies bought actually said,  
21 but it's in a deck that was used in discussions with a  
22 pharmacy. The labels appear on the first slide, and no witness  
23 was even questioned about that piece of it.

24       All of this is troubling, bluntly, not to mention the way  
25 that the evidence came in about Mr. Racies having been in

1       Portland at the time when he then somehow was down in the Bay  
2       Area buying the product at a Walgreens. And the evidence that  
3       Dr. Bazinet was already working on Prevagen-related research  
4       before Mr. Racies even bought the product and the story about  
5       how he got connected with Mr. Crane and came to be the  
6       plaintiff in this case, all of it struck me as marginal at  
7       best.

8           And I have some real concerns about what the state of the  
9       record is when the plaintiff, in the end, is very equivocal  
10       about what product he bought, and it's very hard to understand  
11       how the presumption of reliance can attach when the plaintiff  
12       makes the sort of evidentiary showing that it did in this case.

13           **MR. WELTMAN:** Do you want me to respond, or is that a  
14       ruling?

15           **THE COURT:** You can respond.

16           **MR. WELTMAN:** Your Honor, where do I start?

17           First off, this is the way we get plaintiffs in cases, is  
18       through referrals, and I can't state why this happened this  
19       way, other than it did.

20           **THE COURT:** Who had contact with Mr. Racies from your  
21       team before he bought the product?

22           **MR. WELTMAN:** None.

23           **THE COURT:** How did Mr. Racies become connected to  
24       your team?

25           **MR. WELTMAN:** Through Mr. Crane.

**THE COURT:** And what were your communications with Mr. Crane before Mr. Racies was connected to you?

**MR. WELTMAN:** We told him that we were investigating Prevagen, and that's why Dr. Bazinet, who has been working for us for years, was looking at it before he bought the product. This is just a coincidence that he did a billing the day before Mr. Racies bought the product. They're two unrelated -- they never saw each other. They don't know each other.

**THE COURT:** Did you have any communications with Mr. Crane about Mr. Racies before he approached Mr. Crane?

**MR. WELTMAN:** None. Not -- I certainly don't -- I don't -- I know my co-counsel didn't either.

This is the way we get plaintiffs. We get them through referring attorneys, and, you know, we -- we take them as we get them.

He bought the product. There is no doubt about it. I don't think there is any confusion. He said he remembered "memory," "improves memory," and he said he remembered the MMS or the reference to the -- to the MMS study. Those are things that have been on the label since 2010 and 2013 respectively before he bought his product.

**THE COURT:** Why wouldn't you put in the labels that were on your exhibit list that you introduced at the class certification stage?

**MR. WELTMAN:** We thought that these were sufficient to

1 show what the labels were. I can't argue with you about that  
2 then.

3 **THE COURT:** Okay.

4 **MR. WELTMAN:** It is what it is.

5 **THE COURT:** Again, it's just exceptionally odd. It  
6 makes me wonder if you're covering up some problem with your  
7 witness.

8 **MR. WELTMAN:** No. That wasn't it. If anything, it  
9 was a minor oversight because we believed that these labels  
10 were sufficient, but it was --

11 **THE COURT:** Do you agree that you never asked any  
12 witness, your client, or anyone else, about the substance of  
13 the first page of the slide? The way that you used Exhibit 355  
14 was focused on the price list; right?

15 **MR. WELTMAN:** Well, we knew the labels were coming in.  
16 We didn't have to ask anybody. It was admitted evidence. It  
17 was an admitted exhibit. Do we have to ask Mr. Underwood, "Are  
18 these the labels?" They're the labels. They were  
19 authenticated and admitted into evidence.

20 **THE COURT:** When?

21 **MR. WELTMAN:** It's an exhibit in evidence. It was  
22 agreed to and admitted into evidence.

23 **THE COURT:** Mr. Cole.

24 **MR. COLE:** Thank you, Your Honor.

25 We agree with the Court. The Jury Instruction No. 18,

1 which both parties agreed to and the Court delivered, said,  
2 "The plaintiff must prove that he relied on defendant's  
3 representations and the class have been exposed to the same  
4 representations."

5 The label he's talking about now, which I think is  
6 Exhibit 355 -- I may be off -- that label that was in a slide  
7 deck, they never showed it to Mr. Racies. They never said --  
8 he never said he saw it or relied on it. And they also never  
9 even put in evidence as to which class members were exposed to  
10 it. So we believe there was a fundamental failure of proof  
11 under the jury instruction that was given to the jury that we  
12 believe actually requires judgment as a matter of law, and we  
13 think that the only way -- the only way not to have judgment as  
14 a matter of law would be to reach the conclusion that the class  
15 shouldn't be saddled with this representative or with what  
16 happened at trial and to decertify it.

17 We think there has to be one or the other because this  
18 witness said that he honestly couldn't remember what he saw.  
19 He used the word "honestly." He honestly couldn't remember --  
20 and he didn't even know anymore if what he saw was based on  
21 something he was shown after he became a plaintiff in the case  
22 or whether he saw it beforehand. That is not an adequate  
23 representative.

24 And we think that's -- actually, we think because we've  
25 had a trial now and that was the evidence and this was their

1 chance to put on their evidence of a certified class, we think  
2 it actually requires judgment as a matter of law, but it  
3 certainly, at a minimum, would require, if not that -- and we  
4 think it is a ground for judgment -- it would have to be  
5 decertification.

6 **THE COURT:** Well, I think it could be both; right? It  
7 could be decertification and then there is the question of what  
8 happens with the individual plaintiff's claim.

9 **MR. COLE:** That's fair enough, Your Honor. That's a  
10 fair point.

11 **MR. WELTMAN:** May I respond?

12 **THE COURT:** Yes.

13 **MR. WELTMAN:** Your Honor, Mr. Underwood, the president  
14 of the company, testified on the stand to two common  
15 representations that were made to -- on the labels, whether the  
16 labels were in evidence or not. He said, "These two common  
17 representations were." One was the MMS study was added on the  
18 label in 2010, and the other one was the tagline "improves  
19 memory" was put on the front of the label in 2013, and that  
20 remained throughout the class period.

21 **THE COURT:** What is your cite to the transcript for  
22 that --

23 **MR. WELTMAN:** It's --

24 **THE COURT:** -- so I can look at what he actually said.  
25 That's not my recollection.

MR. WELTMAN: Well, it's in the briefs, Your Honor. I don't have it memorized. I couldn't memorize every record citation, but it is in all of our briefs that he testified to that, and Mr. Racies testified that he -- he was being honest that he can't -- they show him a label; they show another label. He's being honest, rather than covering up, and says, "Well, right now, I can't completely remember exactly the label, but I remember these things. I remember that it said 'improves memory' and that it had the MMS" -- "it had the reference to the clinical trial on it." Those are the two representations that Mr. Underwood testified under oath were consistent throughout the class period.

So whether we even admitted any label, we now have the admission from the president of the company as these two uniform representations on the front of the label.

**THE COURT:** But that's -- A, I don't remember him testifying quite that way; B, your client -- I'll give him credit. I think he was very careful. He didn't want to get himself in hot water on the stand, so he was very careful, as he should be.

**MR. WELTMAN:** Here, I --

**THE COURT:** How can we have a case that is a false advertising/false labeling case where, for reasons I struggle to understand, you didn't put in the label that you offered at class certification and had ready on your exhibit list?

1 Because talking about the -- what words were said on the label  
2 I don't think establishes class-wide reliance. It's how it  
3 looked and how it was presented, and you've got to show that  
4 that presentation was the same for all class members. That's  
5 what entitles you to the benefit of the presumption of  
6 reliance.

7 And so to have him say on direct, "I remember it said  
8 these things" and then for him to say on cross, "Well, I've  
9 looked at a lot of labels since then and it all gets mixed up  
10 in my head," and fundamentally when just flatout put to him, he  
11 said, "Honestly, I agree with you. I don't recall exactly what  
12 it said."

13 **MR. WELTMAN:** But he then told you what he remembered,  
14 the impressions that he had. It's unrealistic to think that a  
15 consumer who made a purchase six years ago is going to have  
16 complete recollection at a trial this last January. He was  
17 being honest, but what he did recall was very specifically  
18 reference to the clinical trial and reference to the "improves  
19 memory" representation, and I've got the record cite now --  
20 counsel just gave it to me -- where Mr. Underwood testifies to  
21 this. And let me just give -- it's at 295, 3 through 6, quote:

22 "Sometime in 2013, labels with 'improves memory' on the  
23 labels was being shipped out?

24 "A. That's probably -- if it's just within the year, I  
25 would say that's probably right."

1           That's a direct quote.

2           And he had previously stated that was the tagline; in  
3 other words, it was the main, in bold print, representation.

4           Now, Your Honor, I guess if you think that the 355 labels  
5 are not sufficient enough to be examples of the labels, then we  
6 made -- we, I guess, made the wrong call.

7           **MR. COLE:** Your Honor, if I could just briefly respond  
8 to that.

9           This isn't a case where the consumer, the class  
10 representative, couldn't just say he remembered exactly what  
11 the label said. I asked him on cross-examination if he could  
12 even remember if it said 'improves memory,' and that's --  
13 that's -- that's at page 193 of the transcript. And I asked  
14 him, I said:

15           "Q. Isn't it the case, Mr. Racies, that the bottle of  
16 Prevagen you purchased did not say 'improves memory' on the  
17 front but, instead, said 'brain-cell protection'? Isn't that  
18 correct?

19           "A. I couldn't honestly tell you at this point."

20           And, by the way, when Mr. Underwood said that at sometime  
21 in 2013 -- this was testimony that was elicited by the  
22 plaintiff -- that sometime in 2013 there would have been  
23 packages rolling out that said "improves memory," well, this  
24 class goes back to 2012, so there is a problem right there with  
25 this class that would have to be decertified.

1           And, secondly, Mr. Underwood also testified that there is  
2 no shelf life on this product and so we still are stuck with  
3 having no evidence that Mr. Racies actually purchased a product  
4 that said "improves memory" on it.

5           **MR. WELTMAN:** Well, that's also wrong because even, as  
6 we pointed out in our brief, even if he had purchased the  
7 cell-protection version of the label, it represents that it  
8 supports memory.

9           **THE COURT:** Based on what?

10           **MR. WELTMAN:** On the label itself it says it.

11           **THE COURT:** I've got the label in my hand. Tell me  
12 where. Mr. Weltman --

13           **MR. WELTMAN:** I'm going to tell you.

14           **THE COURT:** Okay. Why don't you do that. Why don't  
15 you get the label -- do you have it?

16           **MR. WELTMAN:** I have a pretty good idea. It's not on  
17 the front of the label; it's on the side panel.

18           **THE COURT:** Okay. So right there, the whole point of  
19 this presumption of reliance is the representation is presented  
20 in the same way substantially to everybody in the class. How  
21 is something on the side panel in a white box the same as the  
22 exhibits that you relied upon in getting me to certify this  
23 class in the first place?

24           **MR. WELTMAN:** Well, Your Honor, I could have -- if you  
25 are saying that we don't have evidence prior to 2013 that

1       "improves memory" was the tagline, I'll accept that, but the  
2       fact is that Mr. Racies bought their product in 2014, in  
3       September, well after the tagline with this label came out, and  
4       he testified that he remembered that as one of his major  
5       impressions.

6           So when counsel throws a label up in front of him, you  
7       know, six years after the purchase, he was just being honest  
8       there. But the fact of the matter is he was also honest about  
9       the fact that he remembered buying this for memory improvement,  
10      and that was the major impression he had.

11           **THE COURT:** So they actually didn't show him 536.  
12      They put it in later. Mr. Cole asked the question that he just  
13      read, and the answer was what he just represented.

14           **MR. WELTMAN:** Okay. Well, I mean, he was being  
15      honest. I -- I -- I guess if you don't believe him, we have a  
16      big problem. I thought he was very credible. You don't.  
17      That's -- you know, it's -- I guess *Rashomon* or whatever the  
18      movie is where everybody has a different view.

19           I thought he was highly credible, but you didn't. I  
20      can't -- I can't change your mind on that. If you believe it,  
21      it's probably not going to make any difference what I say.

22           **THE COURT:** Well, I'm just saying what's being offered  
23      as the main evidence by the defense in support of  
24      decertification is your client's words. I don't know that it's  
25      that I didn't believe him about this. I think -- like I said,

1 I think he was very appropriately careful about his testimony.

2 **MR. WELTMAN:** Well, I think he should be because he  
3 was talking about an event that happened six years prior. And  
4 he did remember the key tagline, "improves memory", which  
5 Mr. Underwood testified as of 2013 appeared on the labels.

6 So for that -- for that portion of the class, from 2013  
7 forward, he is an adequate representative for them,  
8 notwithstanding the fact that we don't have every label that  
9 we've submitted in class certification. We have a label, and  
10 if you compare that label to the labels we submitted, you will  
11 see that they're identical or virtually identical. They all  
12 have the "improves memory" tagline on them. Do we have to put  
13 in 25 to prove that point?

14 **THE COURT:** You could have put in one.

15 **MR. WELTMAN:** Well, we did. We put in three.

16 **THE COURT:** Mr. Weltman, look, you offered that  
17 document. The testimony about it was for something totally  
18 different. That's just a fact.

19 **MR. WELTMAN:** There was no testimony on that document.  
20 It was a stipulated-admitted document.

21 **THE COURT:** No. That's not true --

22 **MR. WELTMAN:** Oh, yeah. There was testimony. I'm  
23 sorry. I'm sorry.

24 **THE COURT:** Stop overlapping with me.

25 **MR. WELTMAN:** I'm sorry.

1                   **THE COURT:** Anything further?

2                   **MR. WELTMAN:** No, Your Honor.

3                   **MR. COLE:** No, Your Honor.

4                   **THE COURT:** All right. Submitted.

5                   **MR. WELTMAN:** Thank you.

6                   **MR. COLE:** Thank you.

7                   (Proceedings adjourned at 10:18 a.m.)

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3 CERTIFICATE OF REPORTER

4 I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.

6

7 DATE: Wednesday, February 19, 2020

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9 *Pamela Batalo Hebel*

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter

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